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Supreme Court, U.S.
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NO. 93-2067

In the Supreme Court of the United States

OCTOBER TERM, 1994

DEWAN WHITE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

RASHAUN B. LAWRENCE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

TABLE OF CONTENTS

	Page
REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	Page
Brown v. Board of Education, 347 U.S. 483 (1954)	4
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, _____ U.S. _____, 113 S. Ct. 2217 (1993)	4
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	4
Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969)	3, 4
Hazelwood School District v. United States, 433 U.S. 299 (1977)	2, 4
Hill v. Gautreaux, 425 U.S. 284 (1976)	3
Personnel Administrator v. Feeney, 442 U.S. 256 (1979)	3
Plessy v. Ferguson, 163 U.S. 537 (1896)	4
State v. Russell, 477 N.W.2d 886 (Minn. 1991)	5
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	3

MISCELLANEOUS

Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204 (1991)	5
ILL. S. CT. SPECIAL COMM'N ON THE ADMIN. OF JUSTICE, FINAL REPORT, Part II, ch. VI (Dec. 1993)	2
U.S. SENTENCING COMM'N SYMPOSIUM ON DRUGS AND VIOLENCE, 53 Crl 1265 (June 23, 1993)	2

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Petitioners and Respondents agree that the relationship between race and involvement in the criminal justice system is a complex one over which countless experts have struggled. (Opp. Br. pp. 8-9). Rather than address the root causes of the problem, including racially segregated housing resulting in large measure from government conduct or conduct sanctioned by the government, the General Assembly has flailed out against the most vulnerable subjects of the unconstitutional actions, African-American children. Petitioners do not seek review by this Court merely because the statutes in issue are bad public policy. Petitioners seek review because the General Assembly knew the public housing provision Illinois Juvenile Transfer Act would disparately affect African-

American children; because the Act creates a *de facto* racial classification; because the Act, as expected, affected *only* African-American children; because the Illinois Supreme Court erroneously applied a rational basis test to review the constitutionality of that classification; because other courts around the country have applied different constitutional tests to *de facto* racial classifications; and because considerations of federalism demand a uniform constitutional test.

Unfortunately, the well-intentioned war on drugs has, to a large extent, degenerated into a race war. For example, it has been estimated that Whites account for eighty percent of the illegal drug use in this country, yet African Americans are arrested at four to five times the rate of Whites. *See* U.S. SENTENCING COMM'N SYMPOSIUM ON DRUGS AND VIOLENCE, 53 CrL 1265-68 (June 23, 1993) (attached hereto as Appendix A); ILL. S. CT. SPECIAL COMM'N ON THE ADMIN. OF JUSTICE, FINAL REPORT, Part II, ch. VI, p. 61 n.93 (Dec. 1993) (attached hereto as Appendix B). In Illinois, the General Assembly, through the Juvenile Transfer Act, 705 ILCS 405/3-4(7)(a), has declared African-American children living in or around unconstitutionally segregated housing projects the enemy and aimed the strategic weapon of enhanced penalties at them as its target of opportunity.

In an attempt to avoid the principle that the State must be held constitutionally accountable for the foreseeable discriminatory consequences of the actions of its legislature, Respondents ignore or denigrate the evidence of record and engage in rank speculation based on "evidence" properly stricken below. Moreover, in a case calling for the utmost common sense and candor, Respondents' arguments for denying the Petition are disingenuous.

Respondents assert that Petitioners' showing that *all* 34 children automatically transferred under the Illinois Juvenile Court Act are African-American and the evidence establishing that Chicago public housing projects are racially segregated "prove nothing in this case." (Opp. Br. p. 6). In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Court ruled that less statistically significant evidence could be sufficient to establish a claim of intentional racial discrimination. At the very least, such evidence makes suspect the hypothesis that race was not a factor in the decision making process. *Id.* at 309 n.4.

Moreover, this Court has held that the racial composition of Chicago public housing is not the result of racially neutral demographic phenomena. It is the direct result of invidious and *unremedied* racial segregation carried out by the government actors in violation of the Fifth and Fourteenth Amendments to the Constitution. *See Hill v. Gautreaux*, 425 U.S. 284 (1976). Moreover, the Chicago Housing Authority ("CHA") carried out its invidious discrimination under authority granted it by the General Assembly, and the General Assembly delegated its responsibility to assure that race was not a factor in the sites selected by CHA to the Chicago City Council. *Gautreaux v. CHA*, 296 F. Supp. 907, 909-10 (N.D. Ill. 1969).

In light of the State of Illinois' passive involvement in, if not tacit approval of, the deliberate racial segregation of CHA housing projects, Respondents cannot be heard to claim the General Assembly was unaware that "public housing" means "Black neighborhood" in Illinois. The General Assembly knew of the racially discriminatory effects of the Juvenile Transfer Act and intended those consequences to be visited on African-American children. This is particularly true given the fact that the General Assembly was put on notice of this inevitable discrimination by members of its own body.[1]

Under these circumstances, Respondents should be constitutionally obligated to present evidence affirmatively demonstrating race was not a factor in the decision. *Cf. Personnel Adm'r. v. Feeney*, 442 U.S. 256, 279 nn.24 & 25 (1979) (where statutory history and available evidence affirmatively demonstrated unlawful amicus was not a factor, the inference drawn from the inevitable consequences of the action failed to ripen into proof of unlawful intent). Here, of course, Respondents point to *no* evidence admitted below affirmatively demonstrating race was not a factor. Accordingly, the inference drawn from the proof of prior discrimination, contemporary statements made by members of the decision making body, and the inevitable discriminatory effects of the statutes ripened into proof of

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1 *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (contemporary statements made by members of the decision making body may be highly relevant to the question of intent).

an intent to discriminate. *See, e.g., Hazelwood*, 433 U.S. at 309; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, _____ U.S. _____, 113 S. Ct. 2217, 2228 (1993).

Respondents contend Petitioners' evidence is flawed because it does not include whether any white children have been charged with narcotics offenses in delinquency petitions. (Opp. Br. pp. 7-8). Whether any white children were afforded the procedural protections of the Juvenile Court Act is *irrelevant* to the question of whether any white children were *automatically* tried as adults under the Juvenile Transfer Act. Respondents, of course, have not presented a *single* instance of a white child who was automatically tried as an adult and subjected to enhanced penalties under the Act. To the extent such evidence exists, it is in *Respondents'* possession and Respondents certainly would have brought it to the attention of the courts below. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).[2]

The simple fact is that the law does not apply to a white child in Bridgeport because the government deliberately and invidiously segregated CHA housing. *Gautreaux*, 296 F. Supp. 907. As a result of deliberate government discrimination, the term "public housing," at least in Illinois and particularly with regard to the CHA, is a "code word" for African Americans and is, as found by the trial court, a *de facto* racial classification. The only foreseeable and, indeed, inevitable consequence of this Act is that African-American children will be tried and condemned to adult sentences while similarly situated white children will continue to enjoy the full protections of the Juvenile Court Act, guaranteeing them the right to services necessary to their proper development and age appropriate punishments. This *de jure* separate and *unequal* treatment of children on the basis of race was outlawed in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court should grant this petition if for no other reason

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2 Respondents also argue that the Act is aimed only at the place of the alleged crime and not to the residence of the alleged offender. As proof, it contends that Petitioner White lived *one-half block* from the scene of the alleged crime and Petitioner Lawrence lived within a short walking distance. (Opp. Br. p. 10 n.3). It is uncontroverted, however, that the alleged crimes occurred within the public housing projects in which Petitioners resided.

than to remind the State of Illinois that *Brown*, not *Plessy v. Ferguson*, 163 U.S. 537 (1896), is the law of the land.

Moreover, Respondents do not challenge Petitioners' showing that the courts have applied different standards of review to cases involving *de facto* racial classifications in enhanced penalty cases. As set forth in Petitioners' Opening Brief, a Minnesota court applied a heightened level of scrutiny in holding that a Minnesota statute that created enhanced penalties for possession of crack but not powdered cocaine violated the Fourteenth Amendment's guarantee of equal protection. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Illinois, on the other hand, erroneously applied the rational basis test.

While Petitioners respectfully suggest that strict scrutiny is the proper standard, at the very minimum, heightened scrutiny is required in cases where the racially discriminatory effects of legislation are both obvious and inevitable. This is particularly true in an era when even the most unsophisticated decision making body can and will hide improper motives. *See* Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204, 319 (1991).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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